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STUDENT ARTICLE

RETHINKING THE EMERGING JURISPRUDENCE OF JUVENILE DEATH

GREGORY BASSHAM*

The eighth amendment of the United States Constitution, made applicable to the states by the due process clause of the fourteenth amendment,¹ prohibits the infliction of "cruel and unusual punishments."² Since early in this century,³ one of the settled principles of eighth amendment jurisprudence has been that the amendment proscribes punishments that are "grossly out of proportion to the severity"⁴ of an offender's crime. In several recent Supreme Court decisions, this traditional principle of proportionality has come under attack by High Court conservatives, led by Justice Antonin Scalia.⁵ Given the comparative youthfulness of the conservative insurgents and the realities of contemporary politics, it seems likely that Scalia's reading of the amendment will soon command a majority on

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1. See *Robinson v. California*, 370 U.S. 660 (1962). One of the most contested issues in constitutional history has been whether those who framed and ratified the fourteenth amendment intended it to "incorporate," *i.e.* make applicable to the states, some or all of the provisions of the Bill of Rights. For detailed discussions of the competing views, see M. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); H. ABRAHAM, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES* 28-117 (5th ed. 1988).

2. U.S. CONST. amend. VIII. In full, the amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

3. See *infra* pp. 3-5 and accompanying notes.

4. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.).

5. See *Thompson v. Oklahoma*, 487 U.S. 815, 873 (1988) (Scalia, J., dissenting); *Penry v. Lynaugh*, 109 S. Ct. 2934, 2963-69 (1989) (Scalia, J., concurring in part and dissenting in part); *Stanford v. Kentucky*, 109 S. Ct. 2969, 2977-80 (1989) (opinion of Scalia, J.).

the Court. In this Note, I defend the established eighth amendment doctrine against its conservative detractors.

I begin (in Part I) with a brief overview of the Supreme Court's eighth amendment jurisprudence from the adoption of the Bill of Rights (1791) to the end of the Burger Court (1986). In Part II, I examine the emerging conservative challenge to the Court's traditional reading of the cruel and unusual punishments clause—a challenge first issued in Justice Scalia's dissent in *Thompson v. Oklahoma*⁶ and reasserted the following Term in Scalia-authored opinions in *Stanford v. Kentucky*⁷ and *Penry v. Lynaugh*.⁸ In Part III, I provide a general defense of the traditional principles of eighth amendment jurisprudence against Scalia's animadversions. I conclude (in Part IV) by focusing on one area of eighth amendment law where the case for retaining the traditional approach is particularly compelling—that of juvenile capital punishment.

I. THE SUPREME COURT'S EVOLVING EIGHTH AMENDMENT JURISPRUDENCE

The text of the eighth amendment was copied, almost verbatim, from a provision of the Virginia Declaration of Rights (1776), which in turn was derived from the English Bill of Rights (1689).⁹ Historians are in general agreement that the framers of the amendment originally understood it to prohibit only barbarous and torturous punishments of the sort that had been common in Tudor and Stuart England.¹⁰ The framers clearly did not believe that such then-common punishments as lashing, branding, earcropping, or execution by hanging or firing squad were cruel and unusual.¹¹ Nor did they believe that the eighth amendment prohibited disproportionately severe

6. 487 U.S. 815 (1988).

7. 109 S. Ct. 2969 (1989).

8. 109 S. Ct. 2934 (1989).

9. See *Furman v. Georgia*, 408 U.S. 238, 319 (Marshall, J., concurring).

10. See, e.g., Grannuci, "Nor Cruel and Unusual Punishments Inflicted," *The Original Meaning*, 57 CALIF. L. REV. 839, 860-65 (1969); R. BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* 174 (1982). These punishments included, for capital offenses, burning at the stake, boiling in oil, burial alive, drowning, death by pressing, and disembowelment followed by beheading and quartering. For noncapital offenses, various forms of bodily mutilation were common. See 1 J.F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 476-78; 4 W. BLACKSTONE, *COMMENTARIES* 369-72; W. BERNIS, *FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY* 16 (1979).

11. See Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1031 (1978); L.

punishments so long as those punishments were neither barbaric nor torturous.¹²

The earliest Supreme Court cases involving the amendment, decided in the latter half of the nineteenth century, tended to reflect this original understanding of the clause.¹³ But in *Weems v. United States*¹⁴ the Court "decisively repudiated the 'historical' interpretation of the Clause."¹⁵ In memorable language Justice McKenna, speaking for the Court, explained this departure from the received reading of the amendment:

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provisions for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.¹⁶

A half-century later, in *Trop v. Dulles*,¹⁷ the Court reaffirmed this expansive reading of the clause. Speaking for him-

BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 55 (1975); R. BERGER, *supra* note 10, at 118 n.29.

12. See Grannuci, *supra* note 10, at 860-65. But see *O'Neil v. Vermont*, 144 U.S. 323, 339-41 (1892) (Field, J., dissenting); Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for Weems v. United States' Excessive Punishment Doctrine*, 24 BUFFALO L. REV. 783 (1975).

13. See, e.g., *Wilkerson v. Utah*, 99 U.S. 130 (1878) (upholding execution by firing squad); *In re Kemmler*, 136 U.S. 436 (1890) (upholding execution by electrocution). Cf. *Pervear v. Commonwealth*, 72 U.S. (5 Wall.) 455 (1867); *O'Neil v. Vermont*, 144 U.S. 323 (1892); *Howard v. Fleming*, 191 U.S. 126 (1903).

14. 217 U.S. 349 (1910) (striking down sentence of a Philippine court of fifteen years' imprisonment at hard labor in chains, followed by perpetual surveillance and other permanent civil disabilities, for the crime of falsifying public documents).

15. *Furman v. Georgia*, 408 U.S. 238, 266 (1972) (Brennan, J., concurring).

16. *Weems*, 217 U.S. at 373.

17. 356 U.S. 86 (1958) (invalidating sentence of denaturalization for the crime of wartime desertion).

self and three other members of the Court, Chief Justice Warren declared that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."¹⁸ Echoing *Weems*' conclusion that the cruel and unusual punishments clause "is not fastened to the obsolete but may acquire meaning as public opinion becomes more enlightened,"¹⁹ Warren added that the clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."²⁰

In 1972, in *Furman v. Georgia*,²¹ the Court for the first time squarely addressed the issue of whether the death penalty *per se* is cruel and unusual punishment. The result has aptly been termed a "jurisprudential debacle."²² In an unprecedentedly lengthy and fractured 5-4 decision, the Court held that "as a result of giving the sentencers unguided discretion to impose or not to impose the death penalty for murder, the penalty was being imposed discriminatorily, wantonly and freakishly and so infrequently that any given death sentence was cruel and unusual."²³ There was no majority or plurality opinion, but rather a brief *per curiam* opinion followed by five separate concurrences and four dissents. Justices Marshall and Brennan each concluded that the eighth amendment prohibits capital punishment under any circumstances.²⁴ Justices Stewart, White, and Douglas refused to go so far, but did find that the death penalty as then administered in some forty-odd state and federal jurisdictions²⁵ was being imposed so infrequently and arbitrarily as to constitute cruel and unusual punishment.²⁶ The four dissenters—Justices Blackmun, Powell, Rehnquist, and Chief Jus-

18. *Id.* at 100.

19. *Weems*, 217 U.S. at 378.

20. *Trop*, 356 U.S. at 101. *Cf.* *Robinson v. California*, 370 U.S. 660, 666 (1962) (striking down statute that criminalized narcotics addiction *per se* as inconsistent with "contemporary human knowledge" about drug dependency).

21. 408 U.S. 238 (1972).

22. *Radin*, *supra* note 11, at 998.

23. *Gregg v. Georgia*, 428 U.S. 153, 220-21 (1976) (White, J., concurring). This is a retrospective view of *Furman*'s holding; in the years intervening between *Furman* and *Gregg* there was considerable uncertainty among legislators, courts, and commentators over just how *Furman* should be read. *See Radin*, *supra* note 11, at 998 n.33.

24. *See Furman*, 408 U.S. at 314-74 (Marshall, J., concurring); *id.* at 257-306 (Brennan, J., concurring).

25. *See id.* at 411 (Blackmun, J., dissenting).

26. *See id.* at 306-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring); *id.* at 240-57 (Douglas, J., concurring).

tice Burger²⁷—while agreeing that the eighth amendment “may acquire meaning as public opinion becomes enlightened by human justice,”²⁸ argued that the petitioners had failed to prove “that capital punishment offends the conscience of society to such a degree that [the Court’s] traditional deference”²⁹ to the judgment of the representative branches of government should be abandoned.

Four years later, in *Gregg v. Georgia*,³⁰ the Court upheld a Georgia capital murder statute designed to guide but not completely eliminate sentencing discretion. The Court’s 7-2 majority was split three ways. Justice Stewart, joined by Justices Powell and Stevens, announced the plurality opinion and the judgment of the Court.³¹ Justice White, joined by Justice Rehnquist and Chief Justice Burger, filed an opinion concurring in the judgment.³² Justice Blackmun concurred in the judgment but did not join or author an opinion.³³ The two dissenters, Justices Brennan and Marshall, continued to insist, as they regularly have in subsequent death penalty cases,³⁴ that capital punishment is invariably cruel and unusual punishment.³⁵

In later decisions, largely by cutting and pasting from the various opinions in *Furman* and *Gregg*, the Court developed a consistent analytical framework for deciding eighth amendment issues that remains, apparently,³⁶ good law today.³⁷

27. See *id.* at 375-405 (Burger, C.J., dissenting); *id.* at 405-14 (Blackmun, J., dissenting); *id.* at 414-65 (Powell, J., dissenting); *id.* at 465-70 (Rehnquist, J., dissenting).

28. *Id.* at 383 (Burger, C.J., joined by Blackmun, Powell, and Rehnquist, JJ., dissenting) (quoting *Weems*, 217 U.S. at 378).

29. *Id.* at 385 (Burger, C.J., dissenting).

30. 428 U.S. 153 (1976).

31. *Id.* at 153-207 (opinion of Stewart, Stevens, and Powell, JJ.).

32. *Id.* at 207-26 (White, J., concurring in judgment).

33. See *id.* at 227 (Blackmun, J., concurring in judgment).

34. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 305-06 (1976) (Brennan, J., concurring); *id.* at 306 (Marshall, J., concurring); *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (Brennan, J., concurring); *id.* at 600-01 (Marshall, J., concurring); *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (Marshall, J., concurring in judgment); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (Brennan, J., concurring); *McCleskey v. Kemp*, 481 U.S. 279, 320 (1987) (Brennan, J., dissenting).

35. See *Gregg*, 428 U.S. at 227-31 (Brennan, J., dissenting); *id.* at 231-41 (Marshall, J., dissenting).

36. Parts 1-3(b) of the traditional test, *infra* pp. 9-10, were reaffirmed by a majority of the Court as recently as *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989). See *id.* at 2981-82 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 2982-94 (Brennan, joined by Marshall, Blackmun, and Stevens, JJ., dissenting). The current status of Part 3(c) of the test is

According to that framework, the basic value affirmed and protected by the eighth amendment is the value of human dignity.³⁸ Any punishment that fails to comport with basic human dignity is, as such, cruel and unusual, and will be struck down regardless of how widely accepted or practiced that mode of punishment may be.³⁹ In determining whether a particular punishment is fundamentally inconsistent with the dignity of man, and hence a violation of the eighth amendment, the Court has traditionally employed a three-part test. According to that test, a punishment is unconstitutional if

(1) it is a form of punishment originally understood by the framers to be cruel and unusual;⁴⁰

(2) a demonstrable societal consensus exists that the punishment offends civilized standards of decency;⁴¹
or

uncertain following the Court's decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987) (upholding death sentence of a black petitioner despite strong evidence he was sentenced under a procedure that involved a substantial risk of arbitrary and racially discriminatory decisions). See generally *id.* at 299-320; *id.* at 322-25 (Brennan, J., dissenting).

37. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Rhodes v. Chapman*, 452 U.S. 337, 345-47 (1981); *Enmund v. Florida*, 458 U.S. 782, 788, 798-801 (1982); *Solem v. Helm*, 463 U.S. 277, 284-92 (1983); *Ford v. Wainwright*, 477 U.S. 399, 405-06 (1986); *McCleskey v. Kemp*, 481 U.S. 279, 299-303 (1987); *Penry v. Lynaugh*, 109 S. Ct. 2934, 2959 (1989) (Brennan, J., concurring in part and dissenting in part).

38. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring); *Gregg v. Georgia*, 428 U.S. 153, 182 (1976) (opinion of Stewart, Stevens, and Powell, JJ.); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

39. See *Furman*, 408 U.S. at 376 (Burger, C.J., dissenting) ("Although the Eighth Amendment literally reads as prohibiting only those punishments that are both 'cruel' and 'unusual,' history compels the conclusion that the Constitution prohibits all punishments of extreme and barbarous cruelty regardless of how frequently or infrequently imposed"). For a different view of the intended meaning of the amendment, see R. BERGER, *supra* note 10, at 41 (arguing that the amendment should be read literally as barring only those punishments that are *both* cruel *and* unusual, and that the framers understood the word "unusual" in its ordinary sense, as "signifying something different from that which is ordinarily done" (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958))).

40. See, e.g., *Solem v. Helm*, 463 U.S. 277, 285-86 (1983); *Ford v. Wainwright*, 477 U.S. 399, 405 (1986); *Penry v. Lynaugh*, 109 S. Ct. 2934, 2953 (1989); *Stanford v. Kentucky*, 109 S. Ct. 2969, 2974 (1989).

41. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 269-70 (1972) (Brennan, J., concurring); *id.* at 329 (Marshall, J., concurring); *id.* at 383 (Burger, C.J., dissenting); *id.* at 242 (Douglas, J., concurring); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)

(3) the punishment is (a) "grossly out of proportion to the severity of the crime;"⁴² (b) "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering;"⁴³ or (c) "imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner."⁴⁴

It is Part (3) of this traditional three-part test that has recently come under fire by High Court conservatives. To that attack we now turn.

(opinion of Stewart, Powell, and Stevens, JJ.); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *Ford v. Wainwright*, 477 U.S. 399, 406 (1986); *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988) (plurality opinion); *Penry v. Lynaugh*, 109 S. Ct. 2934, 2953 (1989); *Stanford v. Kentucky*, 109 S. Ct. 2969, 2974 (1989).

In assessing whether a particular punishment is inconsistent with contemporary standards of decency, the Court has repeatedly emphasized that its judgments "should not be, or appear to be, merely the subjective views of individual Justices." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion); see also *Stanford v. Kentucky*, 109 S. Ct. 2969, 2975 (1989). To avoid this risk, the Court has relied heavily on objective indicia of public attitudes toward challenged forms of punishment, most notably legislative enactments and the decisions of sentencing juries. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *Enmund v. Florida*, 458 U.S. 782, 788 (1982); *Solem v. Helm*, 463 U.S. 277, 290-92 (1983); *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987); *Penry v. Lynaugh*, 109 S. Ct. 2934, 2953 (1989).

42. *Gregg*, 428 U.S. at 173 (opinion of Stewart, Powell, and Stevens, JJ.). See also *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *Enmund v. Florida*, 458 U.S. 782, 788 (1982); *Stanford v. Kentucky*, 109 S. Ct. 2969, 2987 (1989) (Brennan, J., dissenting); *id.* at 2981-82 (O'Connor, J., concurring in part and concurring in the judgment).

43. *Gregg*, 428 U.S. at 173 (opinion of Stewart, Powell, and Stevens, JJ.). See also *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Enmund v. Florida*, 458 U.S. 782, 798 (1982); *Thompson v. Oklahoma*, 487 U.S. 815, 833 (1988) (plurality opinion); *Penry v. Lynaugh*, 109 S. Ct. 2934, 2955 (1989) (opinion of O'Connor, J.); *Stanford v. Kentucky*, 109 S. Ct. 2969, 2993 (1989) (Brennan, J., dissenting). But see *Furman v. Georgia*, 408 U.S. 238, 391-96 (1972) (Burger, C.J., dissenting) (criticizing this prong of the traditional test).

44. *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (plurality opinion). See also *Gregg*, 428 U.S. at 189 (opinion of Stewart, Powell, and Stevens, JJ.); *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985); *McCleskey v. Kemp*, 481 U.S. 279, 322-23 (Brennan, J., dissenting).

II. THE EMERGING CONSERVATIVE CHALLENGE TO TRADITIONAL EIGHTH AMENDMENT ANALYSIS

The proposition that the eighth amendment prohibits punishments that are grossly disproportionate to the gravity of the crime committed has been the centerpiece of eighth amendment jurisprudence for eighty years. Many of the Court's leading eighth amendment decisions from *Weems*⁴⁵ to *Ford*⁴⁶ rely explicitly upon this principle of proportionality,⁴⁷ as do scores of lower court cases.⁴⁸ So firmly rooted has the principle become that from 1910 to the advent of the Rehnquist Court (1986) not a single Justice appears to have rejected it.⁴⁹ It thus came as a surprise to many observers when, in 1988, two conservative members of the Court, Justice White and Chief Justice Rehnquist, joined a dissenting opinion by Justice Scalia, urging the Court to scrap the whole third part of the traditional eighth amendment analysis, including the principle of proportionality.⁵⁰ This surprise turned to dismay for many commentators the following Term when Justice Kennedy added his vote to the call for a dramatic revision of traditional eighth amendment doctrine.⁵¹

The opening salvo of this conservative critique was fired in *Thompson v. Oklahoma*.⁵² At issue there was whether the Constitution prohibits the execution of a person who was under sixteen years of age at the time of his or her offense. Applying the standard eighth amendment analysis, four members of the Court, Justices Stevens, Brennan, Marshall, and Blackmun, concluded that the execution of such individuals does constitute cruel and unusual punishment, since it both (a) is inconsis-

45. See *Weems*, 217 U.S. at 371-74.

46. See *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

47. See *supra* note 42 and accompanying text.

48. See, e.g., *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert. den'd*; *Cranke v. Haygood*, 478 U.S. 1020 (1986); *Williams v. Johnson*, 845 F.2d 906, 909 (11th Cir. 1988); *U.S. v. Persico*, 853 F.2d 134, 138 (2d Cir. 1988); *U.S. v. Cook*, 859 F.2d 777, 778 (9th Cir. 1988).

49. Court conservatives have consistently argued, however, that successful proportionality challenges in noncapital sentencing decisions should be "exceedingly rare." *Rummel v. Estelle*, 445 U.S. 263, 272 (1980). Cf. *Hutto v. Davis*, 454 U.S. 370 (1982) (*per curiam*) (upholding sentence of forty years' imprisonment and fine of \$20,000 for possession of nine ounces of marijuana); *Solem v. Helm*, 463 U.S. 277, 311 n.3 (1983) (Burger, C.J., dissenting).

50. See *Thompson*, 487 U.S. at 859-78 (Scalia, J., dissenting).

51. See *Stanford*, 109 S. Ct. at 2977-80 (opinion of Scalia, J.); *Penry*, 109 S. Ct. at 2963-69 (Scalia, J., concurring in part and dissenting in part).

52. 487 U.S. 815 (1988).

tent with contemporary standards of decency, and (b) fails to contribute measurably to either of the two social purposes that purportedly are served by the death penalty, namely retribution and deterrence.⁵³ Justice O'Connor, concurring in the judgment and also accepting the traditional analysis, found the plurality's argument for (a) plausible but not conclusive and its argument for (b) unconvincing.⁵⁴ Preferring to decide the case on narrower grounds than that adopted by the plurality, she held that states may not execute persons under age sixteen at the time of their offense under capital punishment statutes that fail to specify no minimum age at which commission of a capital crime may lead to the offender's execution.⁵⁵ Justice Scalia, joined by Justice White and Chief Justice Rehnquist, filed a dissenting opinion, arguing that the eighth amendment prohibits only those punishments that offend either Parts (1) or (2) of the traditional analysis.⁵⁶ Finding that "the evidence is unusually clear and unequivocal" that the eighth amendment was not "originally understood to prohibit capital punishment for crimes committed by persons under the age of sixteen,"⁵⁷ and that there is no clear indication that society now finds such punishment morally unacceptable,⁵⁸ the dissent concluded that the eighth amendment does not prohibit the execution of persons, like the defendant, who committed crimes when they were fifteen years old. The Court's ninth member, Justice Kennedy, had only recently joined the Court, and took no part in the consideration or decision of the case.

The following Term, in *Stanford v. Kentucky*,⁵⁹ the Court held that the eighth amendment does not categorically prohibit capital punishment for crimes committed by persons aged sixteen or seventeen. Once again the Court was sharply divided, with Justice O'Connor providing the swing vote. Five members of the Court, Justices Scalia, White, Kennedy, O'Connor, and Chief Justice Rehnquist, concluded that the execution of such persons is not barred by either the original understanding of the eighth amendment or by contemporary standards of decency.⁶⁰ Four of these Justices (excluding Justice O'Connor) further concluded that a punishment is proscribed by the

53. See *id.* at 815-38 (plurality opinion).

54. See *id.* at 848-55.

55. See *id.* at 856-59.

56. See *id.* at 859-78.

57. *Id.* at 864.

58. See *id.* at 865-72.

59. 109 S. Ct. 2969 (1989).

60. See *id.* at 2974-77.

eighth amendment *only* if it fails either or both of these two tests.⁶¹ At this Justice O'Connor balked. In a brief opinion concurring in part and concurring in the judgment, she argued that the eighth amendment also imposes on the Court a constitutional duty to determine whether "the 'nexus between the punishment imposed and the defendant's blameworthiness' is proportional."⁶² Since, however, she disagreed with the dissent's conclusion⁶³ that capital punishment for crimes committed by persons under age eighteen is invariably disproportionate, Justice O'Connor concurred in the judgment of the Court.⁶⁴

In *Penry v. Lynaugh*,⁶⁵ decided the same day as *Stanford*, a similarly divided Court held that the eighth amendment does not categorically prohibit the execution of capital murderers who are mildly to moderately mentally retarded. In this case, except for a brief concluding section (Part IV-C), Justice O'Connor delivered the opinion of the Court. In Part IV-C, which no other Justice joined, Justice O'Connor defended the traditional three-part test of eighth amendment claims, but concluded that no part of that test bars the imposition of the death penalty on retarded defendants possessed of the petitioner's powers of reasoning and self-control.⁶⁶ In an opinion concurring in part and dissenting in part, Justice Brennan, joined by Justice Marshall, also defended the traditional test, and argued that executing the mentally retarded is prohibited by both Parts (2) and (3) of that test.⁶⁷ Justice Stevens, in an opinion concurring in part and dissenting in part and joined by Justice Blackmun, reached a similar conclusion.⁶⁸ Justice Scalia, joined by the Chief Justice and Justices White and Kennedy, also filed an opinion concurring in part and dissenting in part, in which he reiterated his view that the cruel and unusual punishments clause prohibits only those punishments that either violate the original understanding or are contrary to evolving standards of decency.⁶⁹

61. See *id.* at 2977-80.

62. *Id.* at 2981 (quoting *Enmund v. Florida*, 458 U.S. 782, 825 (1982) (O'Connor, J., dissenting)).

63. See *id.* at 2987-92 (Brennan, J., dissenting, joined by Marshall, Stevens, and Blackmun, JJ.).

64. See *id.* at 2982.

65. 109 S. Ct. 2934 (1989).

66. See *id.* at 2955-58.

67. See *id.* at 2958-63.

68. See *id.* at 2963.

69. See *id.* at 2964.

As the foregoing makes clear, Justice Scalia's reading of the eighth amendment marks a significant departure from long-standing and controlling precedent. Now it is a legal commonplace that in constitutional law, as in law generally, the principle of *stare decisis* serves a number of important values. It promotes the value of liberty by helping to ensure that "government in all its actions is bound by rules fixed and announced beforehand."⁷⁰ It promotes the value of fairness by respecting the requirement of formal justice that like cases be treated alike. It furthers the values of stability and certainty by enabling individuals to rely on past decisions and to make choices and commit resources based on these expectations. Finally, it promotes the value of efficiency by discouraging the continual relitigation of legal issues and freeing judges from the necessity of continually rethinking such issues *de novo*.⁷¹ This is not to say, of course, that the Court should treat the principle of *stare decisis* as an inflexible command. Because correction through legislative action or constitutional amendment is practically impossible when the Court adopts a mistaken construction of the Constitution,⁷² a rigid adherence to prior decisions would mean that many mistaken rulings would become permanent deformations of constitutional law. Nevertheless, the values underlying the principle of *stare decisis* do establish a presumption in favor of retaining established interpretations. Moreover, this presumption is considerably strengthened when, as is true of the principle of proportionality, a prior interpretation is both long-established and firmly embedded in the law and life of the nation.⁷³ Thus, the Court should accept

70. F. HAYEK, *THE ROAD TO SERFDOM* 72 (1944).

71. For an extended discussion of the virtues of precedential constraint, see Schauer, *Precedent*, 39 STAN. L. REV. 571, 595-602 (1987). See also Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 371-77 (1985); Moragne v. State Lines, Inc., 398 U.S. 375, 403 (1970); C.I.R. v. Fink, 483 U.S. 89, 101-06 (1987) (Stevens, J., dissenting).

72. See *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., concurring). For this reason, the Court has often declared that the doctrine of *stare decisis* has a more limited application in constitutional law than in other areas of law. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272-73 n.18 (1980) (plurality opinion); *C.I.R. v. Fink*, 483 U.S. 89, 104-05 (1987) (Stevens, J., dissenting).

73. See, e.g., *Gathers v. South Carolina*, 109 S. Ct. 2207, 2218 (1989) (Scalia, J., dissenting) ("The respect accorded prior decisions increases, rather than decreases, with their antiquity, as society adjusts itself to their existence, and the surrounding law becomes premised upon their validity"). See also R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 158-59 (1990).

Justice Scalia's call for a sweeping revision of established eighth amendment doctrine only if that call is supported by compelling arguments.

In fact, Justice Scalia's case for his bold new reading is anything but compelling. He offers two arguments for his view, each surprisingly brief and undeveloped. The first argument focuses on language of the eighth amendment—the fact that it bars “cruel and unusual punishments.” The second argument is a stock conservative alarum against the hazards of replacing “judges of the law with a committee of philosopher-kings.”⁷⁴ I shall take up these arguments in turn.

A. Scalia's Textualist Argument

Justice Scalia's first argument consists of a single sentence: “On its face, the phrase ‘cruel and unusual punishments’ limits the evolving standards appropriate for our consideration to those entertained by the society rather than those dictated by our personal consciences.”⁷⁵ Elsewhere in his opinion he adds: a “punishment is either ‘cruel and unusual’ (i.e., society has set its face against it) or it is not.”⁷⁶

This second assertion, like all tautologies, seems pretty unassailable. But what are we to make of the first claim? Those familiar with Justice Scalia's jurisprudence will recognize at once that it flows from his strong commitment to textualism⁷⁷—the doctrine that judges, in interpreting legal texts, should stick close to the “plain” or literal meanings of those texts.⁷⁸ This is a view of legal interpretation that, in constitutional law at least, the Court has consistently rejected for at least five decades⁷⁹ and probably longer.⁸⁰ But what is puz-

74. *Stanford*, 109 S. Ct. at 2980 (opinion of Scalia, J.).

75. *Thompson*, 487 U.S. at 873 (Scalia, J., dissenting).

76. *Stanford*, 109 S. Ct. at 2979.

77. See, e.g., *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1831-34 (1988) (Scalia, J., concurring in part and dissenting in part); *I.N.S. v. Cardoza-Fonesca*, 480 U.S. 421, 451 (1987) (Scalia, J., concurring in the judgment); *Maryland v. Craig*, 110 S. Ct. 3157, 3171-76 (1990) (Scalia, J., dissenting).

78. For related but somewhat different uses of “textualism,” see P. BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 25-38 (1982); M. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 60 (1988); Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 211 (1988). For a helpful general discussion, see Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990).

79. See, e.g., *United States v. American Trucking Association*, 310 U.S. 534, 545 (1940) (rejecting the so-called “Plain Meaning Rule,” according to which courts were permitted to consult extra-textual evidence of original

zling here is that in this case the "plain" language of the amendment clearly does not support Scalia's reading. "On its face," what the amendment prohibits are punishments that are "cruel," i.e. really cruel, not merely conventionally believed to be such, "and unusual," i.e. rarely if ever imposed. By no stretch does the "plain meaning" of the text require judges to uphold punishments that are both grossly disproportionate and imposed on a tiny fraction of otherwise indistinguishable offenders.

To be sure, the literal language of the amendment does appear to support one of Scalia's claims: that the amendment applies only to punishments that are not commonly imposed.⁸¹ We noted earlier that it is disputed whether this literal sense accords with the original understanding of the amendment.⁸² This should at least give Scalia pause, since he professes to view the original "meaning" (public understanding) of constitutional language as binding.⁸³ Of more significance is the fact that the Court has consistently rejected the view that the Constitution should be interpreted with the sort of strict literalness often thought appropriate to other kinds of legal instruments.⁸⁴ Thus, the seemingly absolute language of the first

legislative or framers' intent only in cases in which the meaning of the text at issue was not "plain"). Cf. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 789 (1986) (White, J., dissenting) ("As its prior cases clearly show, . . . this Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the 'plain meaning' of the Constitution's text").

80. See generally L. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 336-38 (1988).

81. In fact, of course, Scalia wants (and needs) an even stronger conclusion: that the amendment applies only to punishments that are not widely *authorized* (even if seldomly imposed). In other words, Scalia wants to read the word "unusual" in the phrase "cruel and unusual punishment" to mean "authorized in few if any jurisdictions," not "seldomly if ever imposed on eligible offenders." The execution of persons under age eighteen is unusual in the second sense but not in the first. See generally V. STREIB, *DEATH PENALTY FOR JUVENILES* 24-30 (1987). As a matter of ordinary usage, Scalia's reading is possible but less intuitive than the alternative sense.

82. See *supra* note 39.

83. See Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

84. See, e.g., *United States v. Classic*, 313 U.S. 299, 316 (1941) ("[W]e read [the Constitution's] words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of great purposes which were intended to be achieved by the Constitution as a continuing instrument of government"); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 789 (1986) ("[T]he Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing

amendment,⁸⁵ declaring *inter alia* that Congress shall make "no law" prohibiting the free exercise of religion or abridging freedom of speech and press, has never been read as a categorical prohibition.⁸⁶ The constitutional mandate that the "trial of all Crimes, except in cases of impeachment, shall be by jury"⁸⁷ has been held not to apply to petty,⁸⁸ juvenile,⁸⁹ or military crimes,⁹⁰ or to prohibit defendants from waiving their right to a jury trial.⁹¹ The privileges and immunities clause, providing that the "citizens of each State shall be entitled to *all* Privileges and Immunities of Citizens in the several States,"⁹² has not been interpreted as barring all preferential treatment, however reasonable or minor, by a state of its own citizens over citizens of other states.⁹³ The presentment clause, providing that "[e]very order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States,"⁹⁴ has not been read to require that every vote taken prior to the passage of legislation, or every resolution not intended to have the

fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it") (White, J., dissenting). See also *Home Bldg. and Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934).

85. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

86. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1879) (upholding application of a federal anti-polygamy law to a Mormon whose religious convictions obliged him to engage in that practice); *Employment Division v. Smith*, 110 S. Ct. 1595 (1990) (holding that the free exercise clause permits states to prohibit sacramental peyote use and thus deny unemployment benefits to persons discharged for such use); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 568 (1942) (noting that there are various "well-defined and narrowly limited classes of speech," such as perjury, obscenity, and incitement, "the prevention of which [has] never [been] thought to raise any Constitutional problem").

87. U.S. CONST. art. III, § 2.

88. See generally *U.S. v. Barnett*, 376 U.S. 681, 740-53 (1964) (Goldberg, J., dissenting).

89. See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

90. See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866).

91. See, e.g., *Patton v. United States*, 281 U.S. 276 (1930).

92. U.S. CONST. art. IV, § 2 (emphasis added).

93. See, e.g., *Corfield v. Coryell*, 6 Fed. Cas. 546, 551-52 (No. 3230) (C.C.E.D. Pa. 1823); *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 387 (1978).

94. U.S. CONST. art. I, § 7.

force of law, be submitted to the President, as the clause seems literally to require.⁹⁵ And so on for many other provisions.⁹⁶

What these examples show is that the Court has often—and rightly—refused to construe the Constitution with mechanical literalness. The cruel and unusual punishments clause is one of many provisions which the Court has declined to interpret literally, believing that to do so would be inconsistent with the framers' intentions and the broader purposes they sought to achieve.⁹⁷ To point out, as Justice Scalia does, that one element of the Court's traditional eighth amendment doctrine is in apparent contradiction with the literal sense of the amendment is doubtless significant but hardly dispositive. At most, it succeeds in shifting the burden of proof to those who support the traditional view to show why this particular departure from the literal import of the amendment is justified. In Part III, I take up this challenge.

95. See, e.g., *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798) (holding that congressional resolutions proposing federal constitutional amendments need not be submitted to the President). See generally *THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION* 127-28 (rev. ed. 1973).

96. Thus, despite the fourteenth amendment's guarantee of "equal protection of the laws," the Court has consistently upheld laws that impact persons unequally so long as those laws have a "reasonable basis" or serve "important" or "compelling" government objectives. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1436-1672 (2d ed. 1988). Likewise, the constitutional injunction against any state entering "into any Agreement or Compact with another State" without congressional consent has been construed not to apply to interstate agreements on such minor matters as adjustments of boundaries. See, e.g., *Virginia v. Tennessee*, 148 U.S. 503 (1893). For further examples, see L. LEVY, *supra* note 80, at 336-38.

97. As legal historians have shown, the original Constitution and Bill of Rights were framed and adopted by men committed to the common-law interpretive canon that laws should not be interpreted literally, so as to defeat the apparent intent of their makers, but "equitably" or "rationally" so as to effect that intent and the outcome consistent with justice and right reason. See, e.g., A. HAMILTON, *THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY* 391 (J. Goebel, Jr. & J. Smith eds. 1964) ("In law as in Religion the letter kills[,] the spirit makes alive"); J. WILSON, 2 *THE WORKS OF JAMES WILSON* 478 (R. McCloskey ed. 1967) ("Equity is synonymous with true and sound construction"). See generally W. CROSKEY, 1 *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 363-74; Siegel, *The Aristotelian Basis of English Law, 1450-1800*, 56 N.Y.U. L. REV. 18 (1981); Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 802-08 (1987).

B. *Scalia's Majoritarian Argument*

In *Stanford*, Justice Scalia offers a second reason for abandoning Part (3) of the traditional eighth amendment analysis: that it is inconsistent with due judicial deference to the judgments of electorally accountable officials. Scalia writes:

By reaching a decision supported neither by constitutional text nor by the demonstrable current standards of our citizens, the dissent displays a failure to appreciate that "those institutions which the Constitution is supposed to limit" include the Court itself. To say, as the dissent says, that "it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty—and to mean that as the dissent means it, i.e., that it is for us to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think "proportionate" and "measurably contributory to acceptable goals of punishment"—to say and mean that, is to replace judges of the law with a committee of philosopher-kings.⁹⁸

Implicit in this quotation is a vision of constitutional adjudication that can only be described as contra-constitutional. It is widely agreed that the Constitution, as it came from the hands of its eighteenth-century framers, was in many respects a deliberately antimajoritarian document.⁹⁹ Responding to perceived democratic excesses during and after the Revolutionary War, the framers sought to dilute the impact of popular opinion by creating an elaborate system of separated and enumerated powers, indirect elections, and checks and balances among the three branches of the national government. An essential feature of this system was the establishment of an independent judiciary, insulated from majoritarian pressures and empowered, as Alexander Hamilton said, to

guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves,

98. *Stanford*, 109 S. Ct. at 2980.

99. See, e.g., G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 471-518 (1969); Hofstadter, *The Founding Fathers: An Age of Realism*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 62-74 (R. Horwitz ed., 3d ed. 1986); Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 *IOWA L. REV.* 401, 468-79 (1986).

and which . . . have a tendency . . . to occasion dangerous innovations in government, and serious oppressions of the minor party in the community.¹⁰⁰

As Justice Brennan notes in his dissent in *Stanford*, "Justice Scalia's approach would largely return the task of defining the contours of the Eighth Amendment to political majorities."¹⁰¹ But "[t]he very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."¹⁰² If applied generally to the Constitution's "majestic generalities"¹⁰³ it would turn what was meant for bread into stone and undermine the Court's historical role in our constitutional system to "stand against any winds that blow as havens for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."¹⁰⁴

The costs of generalizing Justice Scalia's majoritarian argument are clearly considerable. Judgments about proportionality do not differ significantly from many other types of judgments judges are regularly required to make under current constitutional doctrine. To cite a few of the better known examples: Under currently accepted equal protection, free speech, and free exercise standards, judges must decide whether challenged governmental actions serve "important" or "compelling" state interests.¹⁰⁵ One strand of contemporary free speech doctrine requires courts to "balance" competing

100. THE FEDERALIST No. 78, at 527 (A. Hamilton) (J. Cooke ed. 1961).

101. *Stanford*, 109 S. Ct. at 2986-87.

102. *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

103. *Id.* at 639.

104. *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

105. See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (intermediate judicial scrutiny under the equal protection clause requires that a challenged state action be substantially related to an important government objective); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (content-based restrictions on political speech in a public forum are permissible only if they serve a compelling state interest and are narrowly tailored to achieve that end); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 141 (1987) (laws or state practices substantially burdening free exercise of religion are justifiable only if they serve a compelling state interest by means narrowly tailored to that end); but see *Employment Division v. Smith*, 110 S. Ct. 1595, 1601 (1990) (religion-based exemptions to otherwise valid secular laws are not required except when petitioner's free exercise claim also implicates other constitutional protections).

private and governmental interests.¹⁰⁶ And long-recognized due process principles require judges to determine whether laws or governmental practices violate norms "implicit in the concept of ordered liberty"¹⁰⁷ or trench on values "so rooted in the traditions and conscience of our people as to be ranked as fundamental."¹⁰⁸ None of these various doctrines has any better grounding in the original understanding or constitutional text than does the principle of proportionality.¹⁰⁹ None has any firmer roots in the Court's prior decisions. None provides any more "objective" criteria for resolving issues falling under them. Accordingly, Justice Scalia's majoritarian argument would seem to apply with equal force to each of these principles. Yet few would be prepared to accept the sweeping purge of established constitutional doctrine his argument appears to imply.

In sum, Justice Scalia has not met the substantial burden of proof rightly imposed on those who seek to overturn Supreme Court precedents as old and as firmly established as is the eighth amendment principle of proportionality. Additional support for this conclusion can be garnered by examining arguments that support the traditional eighth amendment analysis. To that task we now turn.

III. A BRIEF DEFENSE OF THE TRADITIONAL ANALYSIS

In his critique of eighth amendment proportionality analysis, Justice Scalia asserts that the Court has "never invalidated a punishment on this basis alone."¹¹⁰ All of the cases condemning a punishment under this mode of analysis, he contends, "also found that the objective indicators of state laws or jury determinations evidenced a societal consensus against that penalty."¹¹¹ Thus, according to Scalia, not only is Part (3) of

106. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (adopting balancing approach toward government regulations having merely an incidental suppressive impact on speech or expressive conduct). See generally L. TRIBE, *supra* note 96, at 977-1010.

107. *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937). See also *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

108. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). See also *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977); *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2341 (1989) (plurality opinion).

109. See generally Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710-13 (1975); L. LEVY, *supra* note 80, at 175-76, 195-220; R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 166-220 (1977).

110. *Stanford*, 109 S. Ct. at 2980.

111. *Id.*

the traditional eighth amendment test a dangerous invitation to judicial freelancing; it is not even strictly needed to make sense of the Court's prior eighth amendment decisions.

This is a bit disingenuous, since Scalia fails to mention that the Court has repeatedly and explicitly stated that "the Eighth Amendment concept of proportionality involves more than merely a measurement of contemporary standards of decency. It requires in addition that the penalty imposed in a capital case be proportional to the harm caused and the defendant's blameworthiness."¹¹² Indeed, it is positively misleading, since a number of High Court eighth amendment cases are expressly premised on one or more prongs of Part (3) of the traditional test.¹¹³ But here I want to focus attention on one entire area of eighth amendment case-law that makes no sense at all apart from Part (3) principles, that of prisoners' rights law.

Prior to the 1960s, courts generally took a "hands off" approach toward prisons, viewing prisoners as virtual slaves of the state who had lost most of their rights upon conviction.¹¹⁴ Beginning in the mid-1960s, following the Court's decision in *Cooper v. Pete*¹¹⁵ that inmates have the right to sue prison officials under Section 1983 of the Civil Rights Act of 1871, lower courts began to take a more "activist" stance toward prison conditions and prisoners' rights. The resulting changes, both in terms of prison conditions and prison-related adjudication, have been dramatic. Whole prison systems have been fundamentally restructured under judicial supervision.¹¹⁶ Forty-three states are currently under court orders because of prison overcrowding or other abuses.¹¹⁷ And inmate suits against prison officials, once a mere trickle, have become a virtual

112. *Enmund v. Florida*, 458 U.S. 782, 823 (1982). See also *Coker v. Georgia*, 433 U.S. 584, 597 (1977); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

113. See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1977) (holding that deliberate indifference to the serious medical needs of prison inmate violates eighth amendment ban on the unnecessary and wanton infliction of pain); *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (striking down vague capital punishment statute on grounds that it created a substantial risk that the penalty would be imposed in an arbitrary and capricious manner).

114. See Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 508-09 (1963).

115. 378 U.S. 546 (1964).

116. See generally B. CROUCH & J. MARQUART, *AN APPEAL TO JUSTICE: LITIGATED REFORM OF TEXAS PRISONS* (1989); L. YACKLE, *REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM* (1989); COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS (J. DiIulio ed. 1990).

117. See *Drug Cases Clog the Courts*, 76 A.B.A. J. 34, 34 (1990).

flood.¹¹⁸ As a result, prisoners' rights jurisprudence is now clearly the highest impact area of eighth amendment law.

Inmate eighth amendment suits against prison officials can be grouped into two broad classes: systemic and non-systemic suits. Systemic suits are typically class-action suits that challenge an entire system or pattern of punishment practices that affect all inmates, or large groups of inmates, more or less equally. An example is *Hutto v. Finney*,¹¹⁹ in which the Court upheld challenged elements of a lower court ruling mandating sweeping reforms in the Arkansas prison system. Non-systemic suits, by contrast, challenge the treatment of individual inmates who allegedly have been singled out for arbitrary, excessively harsh, or inhumane punishment. *Estelle v. Gamble*,¹²⁰ in which the Court held that deliberate indifference to the serious medical needs of the petitioner constituted cruel and unusual punishment, exemplifies this second type of suit.

Virtually no one now advocates a return to the "hands off" approach of earlier days with respect to non-systemic prisoners' rights suits. Judicial involvement in systemic suits naturally tends to be more controversial, owing to legitimate concerns about separation of powers and judicial competence to direct far-reaching prison change.¹²¹ However, it is widely agreed that court-ordered systemic prison reform is sometimes imperative. Federal judge Frank M. Johnson, Jr. describes one such case:

A shocking example of a failure of state officials to discharge their duty was forcefully presented in a lawsuit tried before me in 1972, *Newman v. Alabama*, which challenged the constitutional sufficiency of medical care available to prisoners in the Alabama penal system. The evidence in that case convincingly demonstrated that correctional officers on occasion intentionally denied inmates the right to examination by a physician or to treatment by trained medical personnel, and that they

118. See B. CROUCH & J. MARQUART, *supra* note 116, at 1 ("In 1966, for example, 219 suits were filed by prisoners; by the late 1970s, nearly 10,000 were being filed annually").

119. 437 U.S. 678 (1978).

120. 429 U.S. 97 (1977).

121. For generally critical assessments of judicial intervention in prison affairs, see Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978); Boatwright, *Federal Courts and States Prison Reform: A Formula for Large Scale Federal Intervention into State Affairs*, 14 SUFFOLK U.L. REV. 545 (1980); Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1978).

routinely withheld medicine and other treatments prescribed by physicians. Further evidence showed that untrained inmates served as ward attendants and X-ray, laboratory, and dental technicians . . . , and [that] unsupervised inmates without formal training pulled teeth, gave injections, sutured, and performed minor surgery. In fact, death resulting from gross neglect and totally inadequate treatment was not unusual.

. . . A quadriplegic with bedsores infested with maggots was bathed and had his bandages changed only once in the month before his death. An inmate who could not eat received no nourishment for three days prior to his death even though intravenous feeding had been ordered by a doctor. A geriatric inmate who had suffered a stroke was made to sit each day on a wooden bench so that he would not soil his bed; he frequently fell onto the floor; his legs became swollen from a lack of circulation, necessitating the amputation of a leg the day before his death.¹²²

Better than any abstract argument could, such descriptions demonstrate that any defensible eighth amendment test must apply *both* to the sentencing decisions of courts *and* to the punishment practices of prison officials and jailers.

By this standard, Justice Scalia's two-part test of eighth amendment claims is clearly inadequate. What we today would consider morally intolerable treatment of prisoners was commonplace in the framers' generation and occasioned few if any constitutional qualms.¹²³ Thus, the original intent prong of Justice Scalia's test affords little meaningful protection for prisoners. More promising is Scalia's second test, which prohibits punishments contrary to the "evolving standards of decency that mark the progress of a maturing society."¹²⁴ But even this test, as Scalia glosses it, is far from adequate.

As Justice Scalia construes it, the evolving standards test prohibits punishments that society now "overwhelmingly disapproves,"¹²⁵ as evidenced "in the operative acts (laws and

122. Johnson, *The Constitution and the Federal Judge*, 54 TEX. L. REV. 903, 907 (1976) (citations omitted). Cf. Hirschkop and Milleman, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969); B. CROUCH & J. MARQUART, *supra* note 116, at 16-29.

123. See generally Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179, 1188-92 (1982).

124. *Stanford*, 109 S. Ct. at 2980 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

125. *Id.*

application of laws) that the people have approved."¹²⁶ Other indicia that society now regards a particular form of punishment as morally unacceptable—including public opinion polls—are deemed too unreliable for purposes of judicial review.¹²⁷ By this standard, of course, judicial intervention in prison affairs is rarely justified, since elected officials and prison administrators have consistently resisted efforts to remedy scandalous conditions in America's prisons and jails.¹²⁸

Even if one adopted a less restrictive view of acceptable indicia of current public attitudes toward the treatment of prisoners, the evolving standards test would still be incapable of explaining or justifying most prison reform case-law. As Sherman and Hawkins note, the unfortunate truth is that "[c]oncerning correctional conditions, Romilly's advice to Bentham still applies: the public 'does not care tuppence' about prison conditions."¹²⁹ For this reason, relatively few lower court prisoners' rights decisions make even the pretense of examining "objective indicia" of current public attitudes regarding the treatment and living conditions of inmates. Instead, these decisions are typically bottomed quite explicitly on considerations of proportionality¹³⁰ or other equally "subjective" criteria, such as whether confinement conditions

126. *Id.* at 2979. As many critics of the death penalty have pointed out, jury sentencing decisions cannot be viewed as accurate barometers of societal attitudes toward capital punishment, because "death qualification" procedures ordinarily disqualify potential jurors opposed to the use of the death penalty. See, e.g., Acker, *Dual and Unusual: Competing Views of Death Penalty Adjudication*, 26 CRIM. L. BULL. 123, 131 n.42 (1990); F. ZIMRING & G. HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 67 (1986). This is particularly relevant in the context of capital sentences for juveniles, since "[e]very reasonably reliable public opinion poll ever conducted on the question of the death penalty for juveniles has found that a majority of the respondents oppose it." V. STREIB, *supra* note 81, at 34.

127. *Stanford*, 109 S. Ct. at 2979.

128. See B. CROUCH & J. MARQUART, *supra* note 116, at 4. See generally L. YACKLE, *supra* note 116, at 108-67.

129. M. SHERMAN & G. HAWKINS, *IMPRISONMENT IN AMERICA: CHOOSING THE FUTURE* 125 (1981).

130. See, e.g., *Howard v. King*, 707 F.2d 215, 218 (5th Cir. 1983); *Smith v. Coughlin*, 748 F.2d 783, 787 (2d Cir. 1984); *Baumann v. Arizona Dept. of Corrections*, 754 F.2d 841, 846 (9th Cir. 1985); *Nottingham v. Peoria*, 709 F. Supp. 542, 546 (M.D. Pa. 1988); *Cody v. Hilliard*, 830 F.2d 912, 913 (8th Cir. 1987), *cert. den'd*, 485 U.S. 106 (1988); *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988), *cert. den'd*, 109 S. Ct. 2087 (1989). Cf. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (holding that prison conditions "must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting punishment").

"shock the conscience"¹³¹ of the court or involve the "wanton and unnecessary infliction of pain."¹³²

In short, Justice Scalia's suggested analysis of the cruel and unusual punishments clause fails either to explain or to justify a vast body of clearly justifiable eighth amendment case-law. Of course, Scalia might argue that the whole line of prison reform cases is misbegotten and that courts should now frankly and explicitly return to the "hands off" approach of earlier days. But that is a view which few in the legal community would support, and which, in fact, even the Court's most conservative members have consistently opposed.¹³³ Alternatively, and perhaps more likely, Scalia might argue for a two-track eighth amendment analysis, one track applying to sentencing decisions and one to conditions of confinement. However, it is difficult to imagine what principled basis Scalia might offer for such a bifurcated analysis.¹³⁴ Certainly there is no basis in the Court's eighth amendment case-law for any such two-track test. And in law, as elsewhere, complexities should not be multiplied without necessity.

131. See, e.g., *Holt v. Sarver*, 309 F. Supp. 362, 380 (E.D. Ark. 1970); *Burns v. Swenson*, 430 F.2d 771, 778 (8th Cir. 1972), *cert. den'd*, 404 U.S. 1062 (1972).

132. See, e.g., *Caldwell v. Miller*, 790 F.2d 589, 600 (7th Cir. 1986); *Hemphill v. Moore*, 661 F. Supp. 1192, 1194 (E.D. Mo. 1987); *Ort v. White*, 813 F.2d 318, 322 (11th Cir. 1987); *Reutcke v. Dahm*, 707 F. Supp. 1121, 1134 (D. Neb. 1988). Cf. *Whiteley v. Albers*, 475 U.S. 312, 319 (1986) (reaffirming prior holding that the eighth amendment prohibits infliction of unnecessary and wanton pain on prison inmates).

133. Even Justice (now Chief Justice) Rehnquist, of whom it might almost be said that he never met a harsh punishment he didn't like, joined Justice Powell's majority opinion in *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), applying the traditional eighth amendment analysis to prison conditions. Justice White also joined Powell's opinion.

134. It might be suggested that such a principled basis lies in the value of judicial deference to the representative branches. When a court strikes down a sentencing decision it invalidates a penalty expressly authorized by elected officials. By contrast, when a court intervenes in prison administration it typically nullifies acts that have no express legislative authorization. This difference is important enough, it might be argued, to warrant the kind of two-track eighth amendment analysis at issue.

Notice, however, that this is not an argument Justice Scalia can accept. His claim is that no punishment is barred by the eighth amendment unless it is both cruel *and* unusual. But cruel and inhumane treatment of prisoners was the norm prior to the demise of the "hands off" doctrine. Those who "set their faces" against barbarous prison conditions were federal judges, not elected officials. Thus, Justice Scalia's reading of the cruel and unusual punishments clause is incapable of justifying this vital area of eighth amendment law.

I have focused, to this point, on prison reform adjudication because it provides a clear and relatively uncontroversial counterexample to the adequacy of Justice Scalia's eighth amendment analysis. I have argued that judges should be free, in reviewing prisoners' rights complaints under the eighth amendment, to consider just the sorts of issues that Scalia's test would exclude: (a) whether a punishment is grossly disproportionate to the gravity of a prisoner's offense, and (b) whether a given punishment involves the wanton and purposeless infliction of suffering. That judges should likewise be free to consider such issues in reviewing the constitutionality of sentencing decisions has been powerfully argued by others¹³⁵ and thus can be discussed more briefly. For brevity, I limit consideration to the principle of proportionality.

The notion that the eighth amendment prohibits grossly excessive punishments was not the invention of wild-eyed judicial liberals, bent on writing their own predilections into our nation's fundamental law. The principle first appeared, almost a century ago, in dissenting opinions by conservative Justices Field, Brewer, and Harlan in *O'Neil v. Vermont*.¹³⁶ At issue in *O'Neil* was the constitutionality of a sentence of more than fifty-four years' imprisonment at hard labor and a fine of over \$6,600 for the crime of selling intoxicants without a license. The dissenters there found—as a majority of the Court would later find in *Weems*¹³⁷—that the framers had intended the eighth amendment to bar punishments greatly disproportioned to the offenses charged.¹³⁸ As noted earlier, this historical conclusion was probably mistaken. But as *Weems* and subsequent cases have put beyond doubt, the amendment is not to be viewed as “fastened to the obsolete.”¹³⁹ In particular, the principle that a “punishment for crime should be graduated and proportioned to [the] offense”¹⁴⁰ is now viewed as a constitutional requirement regardless of the framers' intent.

135. See, e.g., Acker, *supra* note 126, at 142, 150-54; V. STREIB, *supra* note 81, at 24-39; H. BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* 92-128 (1987); *Stanford*, 109 S. Ct. at 2982-94 (Brennan, J., dissenting).

136. 144 U.S. 323 (1892). The principle had earlier been explicitly or implicitly affirmed in a number of state court decisions. See L. BERKSON, *supra* note 11, at 68-70.

137. See *Weems*, 217 U.S. at 372-73.

138. See *O'Neil*, 144 U.S. at 339-40 (Field, J., dissenting); *id.* at 371 (Harlan and Brewer, JJ., dissenting).

139. See *supra* note 12 and accompanying text.

140. *Weems*, 217 U.S. at 378.

O'Neil provides a striking illustration of why, for nearly eight decades, liberal and conservative Justices alike have consistently endorsed the principle of proportionality. The fact is that sentencing judges and juries do sometimes impose outrageously excessive punishments on offenders,¹⁴¹ and it has been thought intolerable that a charter of liberties that provides such elaborate safeguards against wrongful conviction should afford no meaningful protection against the arbitrary or inhumane use of the state's coercive power once a verdict of guilt has been pronounced.

It is true that Justice Scalia's narrowly construed evolving standards test would provide protection against some of the most egregious punishments, namely those against which society as a whole has clearly set its face. But our nation's history is replete with examples of barbarous and cruelly excessive penalties that would pass muster under Scalia's purely conventionalist test. That test is thus less attractive than the traditional analysis, which provides "insulation against our baser selves,"¹⁴² even when those baser selves enjoy temporary ascendancy in our legislative assemblies and courts of law. It is also deeply at odds with the fundamental normative vision underlying the Constitution: the notion that individuals have rights, rooted in an ineffaceable dignity or sacredness of persons as such, which may not be violated no matter how powerful or numerous are those who would deny them.¹⁴³ In short,

141. See, e.g., *Handy v. State*, 46 Tex. Crim. 406, 80 S.W. 526 (1904) (thirty-year sentence for burglary of two jars of blackberries); *Nowling v. State*, 151 Fla. 584, 10 So.2d 130 (1942) (three years' imprisonment for concealing one gallon of whiskey); *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968) (life without possibility of parole for rape committed at age fourteen); *Renner v. Beto*, 447 F.2d 20 (5th Cir. 1971) (thirty-year sentence for possession of one marijuana cigarette); *Carter v. State*, 500 S.W.2d 368 (Ark. 1973) (eight-year sentence for consensual homosexual sodomy); *Rummel v. Estelle*, 445 U.S. 263 (1980) (life sentence with possibility of parole for three minor non-violent felonies); *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam) (forty years' imprisonment and fine of \$20,000 for possession of nine ounces marijuana); *Solem v. Helm*, 463 U.S. 277 (1983) (life sentence without possibility of parole for seven non-violent felonies); *Naovarath v. State*, 779 P.2d 944 (Nev. 1989) (life imprisonment without possibility of parole imposed on 13-year-old for murdering his sexual abuser).

142. *Furman*, 408 U.S. at 345 (Marshall, J., concurring).

143. See generally Hofstadter, *supra* note 99, at 62-74. Significantly, the framers apparently did not believe that the written Constitution was the sole source of binding fundamental law; basic human or natural rights were considered judicially enforceable whether enumerated in the constitutional text or not. See generally Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987); Grey, *The Original Understanding and the Unwritten Constitution*, in TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE

Justice Scalia's suggested reading of the eighth amendment is consistent neither with the framers' underlying purposes nor with the Court's prior decisions, nor can it be defended on independent grounds of political morality. Accordingly, it should be rejected.

IV. RETHINKING *THOMPSON*

Given the increasingly conservative drift of the Rehnquist Court, there is little chance its holding in *Stanford* will soon be reconsidered. Not so with *Thompson*, however. It is not unlikely that conservatives on the Court will soon have both the votes and the will¹⁴⁴ to overrule *Thompson* outright. And the peculiar 4-1-3 split in the case, together with the narrow holding that emerged from it,¹⁴⁵ make it likely that the issue presented there—namely, the constitutionality of executing a person who was fifteen at the time of his or her crime—will again be before the Court in the not-too-distant future. In this final section, with an eye to that future case, I argue that the view taken by the plurality in *Thompson*—that the eighth amendment categorically prohibits such executions—is correct.

In the preceding two sections, I defended the Court's traditional three-part eighth amendment analysis. Assuming that defense to be sound, the precise question to be decided is

CONSTITUTION 145-73 (N. York ed. 1988). Scalia's view that, with some concessions to deeply entrenched precedent, judicially enforceable constitutional rights are limited to those embodied in the original constitution is thus itself contrary to the original understanding.

144. *Thompson* is one of many recent cases indicating that the new conservative majority on the Court has scant respect for the principle of *stare decisis*. See, e.g., *Employment Division v. Smith*, 110 S. Ct. 1595, 1601 (1990) (dramatically narrowing the traditional view of when individuals are entitled to religion-based exemptions from secular laws). Justice Scalia has been particularly forthright about this view of precedent. See *South Carolina v. Gathers*, 109 S. Ct. 2207, 2218 (1989). Cf. *Walton v. Arizona*, 110 S. Ct. 3047, 3067-68 (1990) (urging the Court to abandon the rule laid down in *Woodson v. North Carolina*, 428 U.S. 280 (1976), that the eighth amendment prohibits mandatory capital punishment statutes).

145. In cases like *Thompson* in which there is no majority opinion, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest ground." *Gregg*, 428 U.S. at 169 n.15. Thus, what the Court held in *Thompson* is what Justice O'Connor held: that a person fifteen or younger at the time of his or her offense may not be executed under a death penalty statute that specifies no minimum age below which it ceases to apply. *Thompson*, 487 U.S. at 858-59 (O'Connor, J., concurring in the judgment). Since *Thompson* was decided, two death sentences for fifteen-year-old offenders have been struck down under *Thompson's* authority. See *State v. Stone*, 535 So.2d 362 (La. 1988); *Cooper v. State*, 540 N.E.2d 1216 (Ind. 1989).

whether that traditional analysis prohibits the imposition of the death penalty on a person who was under sixteen years of age at the time of his or her offense.

Part (1) of the traditional test, it will be recalled, proscribes punishments that fall within the original understanding of the cruel and unusual punishments clause.¹⁴⁶ We noted earlier that "the evidence is unusually clear and unequivocal" that capital punishment for crimes committed at age fifteen or younger was not originally believed to be barred by the clause.¹⁴⁷ Thus, the first prong of the traditional analysis is clearly satisfied in the present case.

A much tougher question is whether the execution of a fifteen-year-old offender is prohibited by the evolving standards test. We saw earlier that this test has come to be closely linked to two "objective indicia" of public attitudes toward a given sanction: legislative enactments and the sentencing decisions of juries.¹⁴⁸ The most recent statistics bearing on the question indicate that: (1) the last execution in the United States for a crime committed under the age of sixteen occurred in 1948;¹⁴⁹ (2) over one recent five-year period, only five fifteen-year-olds (and no offenders younger than fifteen) were sentenced to death;¹⁵⁰ (3) fourteen states (including the District of Columbia) currently do not authorize capital punishment at all;¹⁵¹ (4) nineteen states authorize capital punishment and set no minimum age at which the penalty may be imposed;¹⁵² (5) eighteen states authorize capital punishment but establish a minimum age for its imposition ranging from sixteen to eighteen.¹⁵³

These statistics are clearly subject to varying interpretations. Thus the dissent in *Thompson*, emphasizing the fact that the death penalty could theoretically be imposed in nineteen states as well as under federal law,¹⁵⁴ found no basis for discerning "with the requisite degree of certainty, a constitutional consensus in this society that no person can ever be executed

146. See *supra* note 40 and accompanying text.

147. See *supra* note 57 and accompanying text.

148. See *supra* note 41 and accompanying text.

149. See *Thompson*, 487 U.S. at 832 (plurality opinion).

150. See *V. STREIB*, *supra* note 81 at 168-69.

151. See *Thompson*, 487 U.S. at 826 (plurality opinion). Vermont is frequently counted as a fifteenth state without a death penalty, since its capital sentencing scheme fails to guide jury discretion as mandated by *Furman*. See *Stanford*, 109 S. Ct. at 2983 n.1 (Brennan, J., dissenting).

152. See *Thompson*, 487 U.S. at 826-27.

153. See *id.* at 829.

154. See *id.* at 865-68.

for a crime committed under the age of 16."¹⁵⁵ The plurality, preferring to spotlight the fact that every legislature that has expressly set a minimum age for capital punishment has set that age at sixteen or above,¹⁵⁶ concluded that the requisite degree of consensus does exist.¹⁵⁷ Justice O'Connor, characteristically,¹⁵⁸ urged a more cautious conclusion: that the evidence supporting such a consensus, while strong, is not yet so compelling that the Court would be justified in declaring a blanket constitutional ban on the execution of any fifteen-year-old offender.¹⁵⁹

These disagreements underscore a familiar theme of recent jurisprudence: that judgments about supposedly "neutral" or "objective" sources of legal values (framers' intent, conventional morality, "plain" textual meaning, etc.) often prove to be no less contestable and value-laden than judgments that attempt to grapple directly with the normative implications of interpretive choices.¹⁶⁰ In this case, Justice O'Connor's modest conclusion of "probable but not proven" appears to be the one best supported by the available evidence.

We therefore turn to Part (3) of the traditional eighth amendment analysis. As we have seen, this requires judges to make an independent assessment whether a given sanction constitutes grossly excessive punishment, makes no measurable contribution to acceptable penological goals, or is authorized under sentencing procedures that create a substantial risk of arbitrary and capricious outcomes.¹⁶¹

Of these three tests, the second has long been the most controversial. First articulated at a time when it was widely believed both that retribution was not an acceptable penological goal¹⁶² and that capital punishment was not a significantly

155. *Id.* at 871-72.

156. *See id.* at 829.

157. *See id.* at 833.

158. *See, e.g., Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3061 (1989) (O'Connor, J., concurring in part) (endorsing the traditional principle that the Court should not formulate a rule of constitutional law broader than the precise facts to which it is applied).

159. *See Thompson*, 487 U.S. at 857-58.

160. *See generally* R. DWORKIN, *LAW'S EMPIRE* 313-54 (1986); J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 63-69 (1980); Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683 (1985); Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1498-1511 (1987).

161. *See supra* notes 40-44 and accompanying text.

162. *See generally Furman*, 408 U.S. at 342-45 (Marshall, J., concurring). *Cf. Williams v. New York*, 337 U.S. 241, 248 (1949) ("Retribution is no

better deterrent to crime than less extreme sanctions,¹⁶³ the measurable contribution principle was vigorously criticized from its inception as inviting judicial policymaking in areas best reserved for legislative judgment.¹⁶⁴ Today, now that each of these once-popular beliefs is widely contested,¹⁶⁵ it may well be wondered whether the measurable contribution principle has any legitimate place in eighth amendment jurisprudence.

Such concerns, while valid, should not be overstated. We have seen that the measurable contribution principle does play a key role—acknowledged even by Court conservatives—in the field of prisoners' rights adjudication.¹⁶⁶ Nevertheless, I agree that the principle should play a limited role in evaluating the constitutionality of sentencing decisions. In particular, courts should not be quick to second-guess legislative judgments about the comparative deterrent value of various punishments. This is a point on which Justice Stevens' plurality opinion in *Thompson* can rightly be faulted. Stevens concludes that the execution of fifteen-year-old offenders does not measurably contribute to the goal of deterrence.¹⁶⁷ However, he cites no direct criminological evidence for this claim. Moreover, the sorts of reasons he does cite (e.g., the small number of juvenile executions in this century and the unlikelihood that many adolescent offenders actually engage in the kind of cost-benefit analysis the deterrence rationale presumes) tend to show, at best, that *fifteen-year-olds* would not be significantly deterred by such executions. But of course a legislature might reasonably determine that a few highly publicized juvenile executions would deter a number of *older* would-be offenders. And I can

longer the dominant objective of the criminal law"); *Morissette v. United States*, 342 U.S. 246, 251 (1952) (speaking approvingly of the "tardy and unfinished substitution of deterrence and reformation in place of retribution and vengeance as the motivation for public prosecution").

163. See generally *Furman*, 408 U.S. at 345-54 (Marshall, J., concurring). See also *id.* at 302 (Brennan, J., concurring); *id.* at 312 (White, J., concurring).

164. See *Furman*, 408 U.S. at 345-54 (Burger, C.J., dissenting).

165. For defenses of more or less retributivist theories of punishment, see Morris, *Persons and Punishment*, 52 *MONIST* 475 (1968); J. MURPHY, *RETRIBUTION, JUSTICE, AND THERAPY* 77-115 (1979); W. BERNs, *supra* note 10, at 153-76; R. NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363-97 (1981); A. VON HIRSCH, *PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS* 31-60 (1985); I. PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* 111-69 (1989). For a much-controverted defense of the deterrent efficacy of capital punishment, see Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 *AM. ECON. REV.* 397 (1975).

166. See *supra* note 132 and accompanying text.

167. *Thompson*, 487 U.S. at 837-38.

see no reason why this should not be counted as an "acceptable" penological goal.

A stronger challenge to the permissibility of executing fifteen-year-olds focuses on whether American jurisdictions currently employ capital sentencing procedures that ensure that the death penalty for teenage offenders will not be imposed in an arbitrary and unpredictable fashion. As the Court's prior cases make clear, imposition of the ultimate penalty for crime is intolerable if there is "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."¹⁶⁸ To pass constitutional muster, state-sanctioned killing must not be "cruel and unusual in the same way that being struck by lightning is cruel and unusual."¹⁶⁹

By these standards, "[t]he imposition of the death penalty on juveniles is a prime example of an arbitrary, capricious, and freakish punishment."¹⁷⁰ Department of Justice statistics indicate that during one recent five-year period, 82,094 arrests were made for willful criminal homicide.¹⁷¹ Of these, only 1,393 were sentenced to death.¹⁷² And of this number, only five were younger than sixteen at the time of the offense.¹⁷³ These five constituted a microscopic 0.3% of the 1,861 persons arrested for willful homicide who were under the age of sixteen.¹⁷⁴

Of course it might be urged that the freakish rarity with which fifteen-year-old offenders are sentenced to death reflects the carefully weighed judgment of juvenile judges, prosecutors, and juries that the ultimate penalty should be reserved for those handful of offenders whose crimes are peculiarly heinous. The available evidence suggests, however, that this is not the case. In the words of the nation's foremost authority on juvenile death sentences, "[n]o rational selection process can be determined, and one is left to conclude that the basis of selection is arbitrary and capricious."¹⁷⁵

168. *Furman*, 408 U.S. at 313 (White, J., concurring). See also *McCleskey v. Kemp*, 481 U.S. 279, 301 (1987); *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988).

169. *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

170. Streib, *Imposing the Death Penalty on Children*, in *CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES* 251 (K. Haas & J. Inciardi eds. 1988).

171. *Thompson*, 487 U.S. at 832 (plurality opinion).

172. *Id.*

173. *Id.* at 832-33.

174. *Id.* at 833 n.39.

175. V. STREIB, *supra* note 81, at 39.

Challenges based on the arbitrariness of juvenile capital sentences were not put forward in any of the opinions in *Thompson* or *Stanford*. Presumably this was because a majority of the Court had recently held in *McCleskey v. Kemp*¹⁷⁶ that such challenges could succeed only if it could be shown that a particular sentencing procedure fails to "focus discretion 'on the particularized nature of the crime and the particularized characteristics of the individual defendant.'"¹⁷⁷ And in neither *Thompson* nor *Stanford* was any such proof attempted.

However, as Justice Brennan demonstrates in his powerful dissent in *McCleskey*, this holding was a wholly unwarrantable departure from controlling precedent.¹⁷⁸ Earlier cases had made clear that it is not enough merely that sentencing discretion be "focused" on particularized considerations.¹⁷⁹ Guided discretion is not an end in itself, but is directed toward a further end—that of insuring that a sanction "unique in its severity and irrevocability"¹⁸⁰ will not be imposed in an arbitrary or discriminatory fashion. The crucial question, then, as the Court's prior cases had recognized, is whether a given sentencing scheme creates a *substantial risk* that capital sentencing decisions will be significantly influenced by impermissible considerations.¹⁸¹

It is no answer to this anti-arbitrariness argument to point out, as the conservative majority did in *McCleskey*,¹⁸² that it would open the gates to a flood of eighth amendment challenges based on any number of arbitrary variables, such as race, sex, or personal attractiveness, which have been shown to influence capital sentencing decisions. That, as Justice Brennan aptly retorted in dissent, is merely "to suggest a fear of too

176. 481 U.S. at 279.

177. *Id.* at 308.

178. *Id.* at 322-24 (Brennan, J., dissenting).

179. See, e.g., *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (plurality opinion) (invalidating state statute requiring sentencers to consider whether an offense was "outrageously or wantonly vile, horrible or inhuman," on grounds it created an unacceptable risk that the penalty would be meted out in an arbitrary and capricious manner); *Maynard v. Cartwright*, 486 U.S. 356, 362-64 (1988) (invoking *Godfrey* to strike down capital punishment provision requiring sentencers to decide whether an offense was "especially heinous, atrocious, or cruel").

180. *Gregg*, 428 U.S. at 189 (opinion of Stewart, Stevens, and Powell, JJ.).

181. See, e.g., *California v. Ramos*, 463 U.S. 992 999 (1988); *California v. Brown*, 479 U.S. 538, 541 (1987); *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (plurality opinion).

182. See *McCleskey*, 481 U.S. at 314-19.

much justice."¹⁸³ The Court should now forthrightly acknowledge that the experiment begun a decade and a half ago in *Gregg* has failed. The underlying assumption of *Gregg* was that guided discretion schemes would reduce to morally tolerable limits the extent to which capital sentencing decisions are determined by arbitrary or discriminatory factors, such as race, class, or sex. That assumption, as study after study has shown,¹⁸⁴ is unfounded. Today, no more than in 1972, does the Constitution tolerate "the infliction of a sentence of death under legal systems that permit this penalty to be so wantonly and freakishly imposed."¹⁸⁵

Finally, under the traditional analysis we must determine whether the execution of a person for a crime committed at age fifteen or younger is grossly disproportionate to the gravity of the offense committed.

In assessing the "gravity" of an offense for purposes of proportionality analysis, the Court has traditionally considered both the seriousness of the harm inflicted and the degree of the offender's culpability.¹⁸⁶ For our purposes, the critical question is whether a person under sixteen years of age is capable of acting with the degree of culpability that can warrant the ultimate punishment.

In addressing this question, the views of respected professional organizations with special expertise are clearly relevant. Strikingly, one finds a strong consensus among such organizations that the death penalty even for sixteen- and seventeen-year-olds is morally unacceptable.¹⁸⁷ Striking, also, is the fact that capital punishment for juveniles has in practice been abolished throughout the developed world. Worldwide, according to Amnesty International statistics, only eight juvenile executions have taken place since 1979.¹⁸⁸ Three of those occurred

183. *Id.* at 339 (Brennan, J., dissenting).

184. See generally S. GROSS & R. MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989); B. NAKELL & K. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY (1987); D. BALOUS, G. WOODWORTH & C. PULASKI, EQUAL JUSTICE AND THE DEATH PENALTY (1990).

185. *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

186. See, e.g., *Solem v. Helm*, 463 U.S. 277, 292 (1983); *Enmund v. Florida*, 458 U.S. 782, 798 (1982); *Coker v. Georgia*, 433 U.S. 584, 598 (1976).

187. These organizations include, among others, the American Bar Association, the American Law Institute, the National Council of Juvenile and Family Court Justices, and the National Council on Crime and Delinquency. See *Stanford*, 109 S. Ct. at 2985 (Brennan, J., dissenting).

188. *Id.*

in the United States. The other five were carried out in Bangladesh, Rwanda, Pakistan, and Barbados.¹⁸⁹

In this country, there has long been broad agreement on the proposition that less culpability should ordinarily attach to a crime committed by a juvenile than to a comparable crime committed by an adult. This is reflected in a wide range of legislative enactments bottomed on the recognition that "'minors often lack the experience, perspective, and judgment' expected of adults."¹⁹⁰ Thus, all states impose special disabilities on juveniles with respect to voting, jury service, marriage, operation of a motor vehicle, and many other activities or engagements believed to require a level of maturation and responsibility juveniles typically lack.¹⁹¹ Moreover, all states have established a juvenile justice system premised on the assumption that most young offenders should not be held to the same standards of accountability as their adult counterparts.¹⁹²

These popularly-held beliefs about the limited capacities of juveniles for informed, responsible decision-making are reinforced by an impressive body of socioscientific evidence. That evidence reveals adolescents to be "more vulnerable, more impulsive, and less self-disciplined than adults;"¹⁹³ less able "to control their conduct and to think in long-range terms;"¹⁹⁴ more impressionable and subject to peer pressure;¹⁹⁵ more prone to risk-taking, bravado, and a false sense of their own "omnipotence and immortality;"¹⁹⁶ and less able to grasp and employ moral concepts and patterns of reasoning characteristically featured in adult ethical decision-making.¹⁹⁷

In addition, there is substantial evidence that adolescents sentenced to death typically suffer from "a battery of psycho-

189. *Id.*

190. *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

191. *See Thompson*, 487 U.S. at 323-24.

192. *Id.* at 824.

193. F. ZIMRING, TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 7 (1978).

194. *Id.*

195. *See Eddings*, 455 U.S. at 104, 115; *Stanford*, 109 S. Ct. at 2989 (Brennan, J., dissenting).

196. Miller, *Adolescent Suicide: Etiology and Treatment*, in 9 ADOLESCENT PSYCHIATRY 327, 329 (S. Feinstein, J. Loomey, A. Schwartzberg, & A. Sorotsky eds. 1981).

197. *See Kohlberg, The Development of Children's Orientations Toward a Moral Order*, 6 VITA HUMANA 11, 30 (1963).

logical, emotional, and other problems"¹⁹⁸ widely recognized to diminish an agent's capacity for responsible choice. In one recent study, for example, all fourteen adolescent death-row inmates studied were found to suffer from serious psychiatric disorders, ranging from psychosis to severe paranoia. Nine were diagnosed as suffering from neurological disorders. Only two had IQ scores above ninety. And all but two had been physically or sexually abused or both.¹⁹⁹

Taken together, the foregoing considerations strongly support the proposition that death is an excessively harsh punishment for fifteen-year-old offenders. They probably do not prove, however, that "all fifteen-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment."²⁰⁰ And that, according to Justice O'Connor, is what must be shown if the proportionality argument is to succeed.

This contention runs counter to some of the deepest currents of the American legal tradition and the Court's capital punishment jurisprudence. One of the bedrock principles of our legal system is that the awesome punitive powers of the state must be hedged about with safeguards against their abuse. Thus, we invest those brought to the bar of criminal justice with a presumption of innocence²⁰¹ and require their accusers to prove beyond a reasonable doubt the guilt of the accused.²⁰² Likewise, we shield the accused with rights to be judged by their peers,²⁰³ to have the effective assistance of counsel,²⁰⁴ and to be tried in accordance with fundamentally fair procedures.²⁰⁵ These familiar features of our acquittal-prone system of criminal justice are thought essential both to guard against the risk of individual injustice and to "command the respect and confidence of the community in . . . the moral force of the criminal law."²⁰⁶ These same considerations apply with equal force when the state stands, not in the role of

198. *Stanford*, 109 S. Ct. at 2990 (Brennan, J., dissenting).

199. See Lewis, Pincus, Bard, Richardson, Pritchep, Feldman, & Yeager, *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584 (1988).

200. *Thompson*, 487 U.S. at 853 (O'Connor, J., concurring in the judgment) (emphasis added).

201. See *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

202. See *In re Winship*, 397 U.S. 358 (1970).

203. See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

204. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

205. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Moore v. Dempsey*, 261 U.S. 86 (1923).

206. *In re Winship*, 397 U.S. at 358, 364.

accuser, but that of final judge of life and death. As the Court has recognized, our constitutional aspirations impose a "high requirement of reliability on the determination that death is the appropriate punishment in a particular case."²⁰⁷ In cases where the defendant is fifteen or younger, the risk of an unwarranted sentence of death is so high that no sentencer should be entrusted with such awesome responsibility.

In conclusion, the Court's emerging eighth amendment jurisprudence in general, and its jurisprudence of juvenile death in particular, should be rethought. That jurisprudence, we have seen, has no adequate basis in the constitutional text or original understanding. It repudiates, for no sufficient reason, longstanding principles of eighth amendment analysis. It renders incoherent a substantial and clearly defensible body of eighth amendment law. Finally, it threatens to introduce into constitutional adjudication generally a principle of deference to majority will and purely conventional values which may eventually undermine the Court's vital capacity "to appeal to men's better natures, to call forth their aspirations, which may have been lost in the moment's hue and cry."²⁰⁸ For all of these reasons, the emerging eighth amendment jurisprudence should be rejected.

207. *Mills v. Maryland*, 486 U.S. 367, 383-84 (1988).

208. A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 26 (2d ed. 1986).

